MEMORANDUM

FROM: Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the "Committee" or the "UCC Committee")

DATE: May 1, 2008

RE: Analysis of International Association of Commercial Administrators ("IACA") Proposed Changes to UCC Article 9

The Committee has analyzed the proposed changes to Uniform Commercial Code (the "UCC") Article 9 proposed by IACA in a communication to the Permanent Editorial Board for the Uniform Commercial Code (the "PEB").[1] This memorandum may be modified to reflect the results of further research and analysis by the Committee. Please note that the positions set forth in this memorandum are those of the Committee only. They have not been adopted by the Business Law Section or its overall membership, or by the State Bar's Board of Governors or its overall membership and are not to be construed as the position of the State Bar of California. Membership on the Committee and in the Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources

A. Guiding Principles and Criteria Applicable Generally to Analysis of Proposed Amendments to the UCC

The analysis of any proposed amendments to the UCC should be guided by the overarching principles of: (A) preserving the uniformity of the UCC, and (B) maintaining the coherence of the UCC and consistency with the underlying purposes and policies of the UCC. Consequently, proposed amendments to the UCC should be analyzed based on the following specific criteria to determine whether the proposed amendments are (1) necessary, (2) appropriate, (3) comprehensive, and (4) uniform.

The first of these criteria, necessity, requires that there be a defect in the current text of the UCC that causes a problem in practice that can be solved by a change in the text. For example, where text has been subject to conflicting interpretations that have generated significant legal disputes or legitimate uncertainty causing significant cost or distortion of transactions, or have led to a result that is contrary to the underlying polices or purposes of the UCC, a change may be necessary. Attempts to "improve" on or "tinker" with the language of the UCC ("we can say it better"), where no serious need for a change has been demonstrated, or where there is no clear evidence that a real, rather than an imagined, problem exists under the current UCC text, should be resisted; attempts to make such changes raise the risk of unintended consequences and needlessly imperil uniformity due to the possibility that they will

[1] Specifically, this memo refers to the proposed changes indicated in the document entitled "International Association of Commercial Administrators (IACA) Proposed Article 9 Statutory Changes to the National Conference of Commissioners on Uniform State Laws (NCCUSL) December 11, 2007" under cover of a letter from Kelly L. Kopyt, Secured Transactions Section Chair, International Association of Commercial Administrators dated December 11, 2007, addressed to the Permanent Editorial Board for the Uniform Commercial Code. A copy of the IACA letter and proposals are attached to this memorandum.

not be universally adopted. Even when it is arguable that the UCC might be improved by a particular amendment, an amendment is generally not advisable if the UCC, in its current form, will achieve the correct result. Changes should not be made to address problems that are the result not of a defect in the current text but of a mistake on the part of a person that failed to comply with the current text, unless the evidence suggests that a significant number of similar mistakes are being made, or are likely to be made, that can be attributed to ambiguous or confusing text.

The second criterion, appropriateness, requires that the amendment be directly targeted at correcting the problematic provisions in the UCC text. This requires precise identification of the problem and extensive and careful analysis of all of the options available to address the defect in the UCC text, and selection of the best solution among these options. The proposed correction for the defect should be complete and not incremental, and the costs, benefits, and burdens of the proposed change to all parties affected should be identified and taken into account. Furthermore, the language of the proposed amendment should be carefully tailored to address the identified defect and avoid unintended collateral effects. Finally, the proposed amendment should be in harmony with and fully integrated within the current UCC text.

The third criterion is comprehensiveness. As it is not feasible to engage in frequent legislative efforts on a nationwide level and frequent change may well result in instability, proposed amendments should, absent emergency, be gathered into a single comprehensive legislative package rather than being introduced individually or in small bundles. Thus, it must always be considered whether a particular amendment, even if meritorious, can be combined with other proposed amendments in a comprehensive legislative package to be presented simultaneously to all states. A comprehensive approach to UCC amendments makes it more likely that such amendments will be fully integrated with each other and with the remainder of the UCC text and will be consistent with the purposes and policies underlying the UCC. Only in exceptional cases, when evidence of serious and imminent actual or potential harm establishes an urgent need for immediate action, should the need for a particular amendment outweigh the importance of acting with due deliberation to propose a comprehensive package of amendments.

A comprehensive package of proposed amendments is more likely to draw the attention, study and input of a far wider constituency, enhancing both the likelihood of quality and the greater likelihood of acceptance, i.e., simultaneous and uniform enactment, producing satisfaction of the fourth criterion, uniformity. A lack of uniformity among the versions of the UCC adopted by the various states leads to increased transaction costs, the potential for costly errors and unintended consequences. Although uniformity can never be guaranteed, a proposed UCC amendment not aimed at solving a unique local problem should not be enacted by a state unless there is evidence that it enjoys sufficient widespread support to make likely nationwide enactment. An endeavor to seek approval of a particular amendment on an ad-hoc state-by-state basis, without a substantial organizational effort on a national level, would be ill-advised and would likely jeopardize the essential uniformity of the UCC.

The best possible text of the proposed amendments, meeting the foregoing criteria and having the best chance of nationwide uniform enactment, is most likely to be achieved through a vetting of the proposed amendments by the co-sponsors of the UCC--the National Conference of Commissioners on Uniform State Laws and the American Law Institute—supported by the American Bar Association and state bar UCC committees around the country.

B. Summary of Conclusions and Recommendations with respect to the IACA Proposals

Of the four changes proposed by IACA, only one directly affects the performance of the duties of the Article 9 filing offices. This is the proposed amendment discussed in Section I, under the heading of "Transmitting Utility Financing Statements." The UCC Committee fully supports both the goal and the approach of this proposed amendment, for the reasons set forth below, but subject to satisfaction of the above-described "comprehensiveness" and "uniformity" criteria. Although, as explained below, the right result can certainly be reached under the current text, and the "problem" sought to be addressed, which arises in a very small number of instances, results not from a defect in the current text but only from a failure by a filing party to follow the guidance of the current text, in the context of a comprehensive package of amendments, clarification of the text by the proposed amendment can reasonably be considered useful to assure that filing offices are not forced to incur significant expense and disruption in order to compensate for such failure by a filing party.

With respect to the IACA proposal to amend the UCC provisions relating to entity debtor names (Section II – "'Public Organic Record' Definition"), the UCC Committee supports, again subject to the criteria of comprehensiveness and uniformity, the goal of the IACA proposal, but with some modification of the text of the proposed amendment. We note that this proposed amendment does not relate to the performance of the duties of the Article 9 filing office but rather is an effort to produce greater clarity, and thus certainty, for parties by assisting in the determination of the "correct" name of a debtor that is a registered organization. Again, the right result can certainly be reached under the current text of the Code, and thus the current text is not defective, but we agree that greater certainty might be achieved by modification of the text.

With respect to the two remaining IACA proposals (Section II – "Correction Statements", and Section IV – "Safe Harbor Forms"), the Committee has concluded that the proposed amendments are unnecessary and undesirable. The alleged defects or problems sought to be addressed by these proposals do not result from the current UCC text. Indeed, the proposals would alter the purposes and policies underlying the current text. Neither amendment is necessary for the proper performance of the duties of Article 9 filing offices.

C. Discussion of Proposals and UCC Committee Recommendations

I. Transmitting Utility Financing Statements (IACA Proposal #3)

CURRENT LAW

UCC Section 9-515(f) provides:

> **9-515 (Duration and effectiveness of financing statements; effect of lapsed financing statement):**
>
> **(f)** If a debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed.

IACA PROPOSAL

IACA's proposal would amend UCC Section 9-515 (f) to read as follows:

9-515(f) If a debtor is a transmitting utility and a filed initial financing statement so indicates, the initial financing statement is effective until a termination statement is filed.

DISCUSSION

A filed financing statement is normally effective for a period of five years after the date of filing. UCC Section 9-515(a). If a continuation statement[2] is timely filed, the effectiveness of the initial financing statement continues for an additional five years. UCC Section 9-515(e).

However, the effectiveness of a financing statement filed against a transmitting utility continues until a termination statement is filed; no continuation statement is necessary, provided that the debtor's status as a transmitting utility is indicated on the financing statement. The indication that the debtor is a transmitting utility is made by checking box 18 of the financing statement. See UCC Section 9-521.

Filing office procedures (and computer programs) are organized to determine, at the time of the filing of the initial financing statement, whether a financing statement is or is not given a five-year lapse date. In order to efficiently make that determination, filing offices must not be forced to make a visual examination of the entire "document" but instead only to ascertain whether there is a check in box 18. Electronic filing processes, in those states that offer this service, produce the same result by means of an equivalent technique. Thus, filing office procedures and programs, for both paper and electronic filings, are set up to make the perpetual term (no lapse date) determination only once, at the outset. Once the filing is assigned a five-year lapse date, an assignment made at the time of the filing of the initial financing statement, typically made by a computer program, filing offices are not set up subsequently to modify that lapse date assignment. This operational arrangement is likely what is meant by the statement in the IACA proposal that "due to technical reasons, filing offices cannot subsequently amend a transmitting utility financing statement to change the five year lapse period to the indefinite lapse period permitted with respect to transmitting utilities." Amendments other than continuations are designed to modify the "content" of the initial filing, i.e., information concerning parties or collateral, but are not designed to modify the duration of effectiveness. The underlying policy of facilitating the efficient operation of the filing office (including avoiding the need for visual examination by a staff person of each filing) certainly would militate against an imposition on the filing office of a duty to visually examine the content of each amendment to look for a change that would produce a modification of the duration of effectiveness that had already been established at the time of the filing of the initial financing statement. This policy is clear and the current UCC text is not inconsistent with this policy. Thus, the current text does not mandate an incorrect result.

The problem sought to be addressed by the IACA proposal results not from a defect in the current text but instead from a filer's attempt to avoid the consequences of its failure to check box 18 on the initial financing statement. In an attempt subsequently to correct that failure, some secured parties have sought to file amendments indicating in narrative form that the debtor is a transmitting utility. The amendment form does not contain a box to check to indicate that the debtor is a transmitting utility. See UCC Section 9-521.

[2] The references here and below to a "continuation statement" or "termination statement" are (for purposes of visualization) to the UCC financing statement amendment form found in Section 9-521(b) with box 3 or box 2, respectively, checked on that form.

Under UCC Section 9-102(39), a financing statement means "a record or records composed of an initial financing statement and any filed record relating to the initial financing statement." A literal reading of that definition might appear to support the argument that a secured party could indicate the debtor's status as a transmitting utility on an amendment and thereby achieve indefinite lapse status. That was, however, not the intent of the drafters and would produce a result inconsistent with the policy of efficient operation of the filing offices; and such a reading would require filing offices to modify their existing intake practices with respect to amendments and to modify their existing computer programs. Moreover, reading that definition as absolute and applicable even when such a reading would produce inefficient, costly and otherwise undesirable results fails to take into account the introductory language of UCC Section 1-201(a), applicable to all definitions, "unless the context otherwise requires, ..."

The proper course of action to be taken by filers that fail properly to indicate a debtor's transmitting utility status on the initial financing statement is to file periodic continuation statements or, in the alternative, file a termination statement and a new initial financing statement indicating the debtor's status (a viable alternative only if there were no financing statements filed by other secured parties prior to the filing of such a new initial financing statement), as well as to better train and better supervise (or seek malpractice remedies against) those to whom they entrust preparation of their filings. This allocates the burden of remedying the error to the one that made the error, rather than onto the filing office.

A court considering the meaning of current text can and should reach the result indicated here. [3] However, the clarification provided by the proposed amendment is certainly an improvement and does not appear to present new problems. Indeed, it would bring Section 9-515(f) [brought forward essentially unchanged from the text of former Section 9-403(6)] into better alignment with Section 9-515(b), which expressly states the rule, previously only implied in former Section 9-403(6), that only an "initial" financing statement that states applicability of a longer duration is effective to achieve a duration beyond the general five-year period.

The Committee also suggests that, in connection with the foregoing amendment, consideration be given to whether any other amendments relating to transmitting utilities are necessary and desirable, so that the entire subject matter is dealt with at one time.

UCC COMMITTEE RECOMMENDATION

As indicated above, the UCC Committee endorses this IACA proposal. Lenders to transmitting utilities can avoid any prejudice or inconvenience simply by properly indicating the debtor's status as a transmitting utility on the initial financing statement. Any amendment should be accompanied by an Official Comment stating clearly that no substantive change in the governing rule is intended.

[3] It is important to stress this point because there can be no assurance that a clarifying amendment will be enacted in all jurisdictions.

II. **"Public Organic Record" Definition** (IACA Proposal #1)

CURRENT LAW

Relevant portions of the current Uniform Commercial Code Sections 9-102(a)(70) and 9-503(a)(1) read as follows:

> **9-102 (Definitions and index of definitions):**
>
> **(a)(70):** "Registered organization" means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.
>
> **9-503 (Name of debtor and secured party):**
>
> **(a)** A financing statement sufficiently provides the name of the debtor only if it does so in accordance with the following rules:
>
> **(1)** If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized.

IACA PROPOSAL

IACA's proposal would amend UCC Sections 9-102(a)(70) and 9-503(a)(1), and add 9-102(a)(67)(A), to read as follows:

> **9-102(a)(70)** "Registered organization" means an organization (i) organized solely under the law of ~~a single~~one ~~s~~State or the United States, and (ii) created by the filing of a public organic record with a governmental unit of~~as to which~~ the ~~s~~State or the United States ~~must maintain a public record showing the organization to have been organized~~.
>
> **9-102(a)(67)(A)** "Public organic record" means a record that is (i) filed with a State or the United States to create an organization, (ii) shows that the organization has been created, and (iii) is available to the public for inspection or copying. The term includes an amendment to or restatement of the record that is filed with the State or the United States and available to the public for inspection or copying.
>
> **9-503(a)(1)(a)** A financing statement sufficiently provides the name of the debtor only if it does so in accordance with the following rules:
>
> **(1)** If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public organic record ~~of the debtor's jurisdiction of organization which shows the debtor to have been organized~~."

DISCUSSION

IACA explains the purpose of these proposed amendments as follows:

> "This proposed revision intends to clarify the application of existing law. A public organic record is a record that is filed to form, organize, incorporate, or otherwise create an organization. If the organization is organized solely under the law of one state or the United States, it is a "registered organization" under this act. The term includes any amendments to or restatements of the original record that are filed publicly. The term includes the articles of incorporation of a business corporation, the articles of incorporation of a nonprofit corporation, a certificate of limited partnership, and a certificate of organization of a limited liability company. In those states where a record must be filed for another type of entity, such as a business trust or a cooperative, to come into existence, the record will constitute a public organic record and the entity will be a registered organization. The record must also be available to the public for inspection or copying."

Under the current UCC text, a financing statement sufficiently provides the name of a debtor that is a registered organization only if it states the name indicated on "the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized." Some have asserted that it can be made clearer which record qualifies as a "public record which shows the debtor to have been organized" and that only one such record qualifies. It is certainly clear, under the current text, that the record that effects the organization or formation of the registered organization – articles of incorporation for a corporation, articles of organization for a limited liability company and a certificate of limited partnership for a limited partnership –constitutes a "public record that shows the debtor has been organized." The obvious undesirability of multiple qualifying records suggests that it should not be necessary to expressly negate that possibility. It might, however, be asserted that a certificate of good standing from the Secretary of State (or other appropriate office) of the debtor's state of organization also qualifies as a "public record which shows the debtor to have been organized." Although it would appear to have no merit, it might even be argued that the Secretary of State index also constitutes such a public record.

Experience has shown that the corporate offices (not the Article 9 filing offices) do not have uniform or even consistently applied polices regarding how they data-enter entity names, have (at least historically) typically generated and entered into the index abbreviations, and do not make an effort to assure that the name in the index is identical to that stated in the articles of the debtor to be the debtor's entity name. Indeed, organizers of the entity are often to blame for confusion in that they do not assure that the document title and the signature line (or other name references) of the articles conform precisely to the name set forth in the provision that purports to state the entity's name. In addition, there is always the possibility of a corporate office inputting error in the creation of the index. Although this is not the task of Article 9 filing officers, the corporate offices would provide a very useful public service by (i) adopting procedures that assure that the name in the index and good standing certificates is always identical to that set forth in the provision of the organizational document that purports to state the entity's name, and (ii) providing, online-accessibly and preferably at no charge, either the "correct" name (as herein described) or an image of the organizational document permitting the inquirer to ascertain for itself the "correct" name. A multiplicity of records (if they are inconsistent) that qualify as a "public record that shows the debtor has been organized" creates the possibility of discrepancies and differences. It is for these reasons that well-advised secured parties in the normal course of their due diligence (i) always examine the articles of the debtor, (ii) do not rely on the index or on a good standing

certificate and (iii) use the Secretary of State's office records only to confirm that the public record of the articles corresponds to the copy of the articles and other information furnished by the debtor. In our experience, careful practitioners have so advised their clients since the initial enactment of the UCC.

UCC COMMITTEE RECOMMENDATION

The IACA goal to eliminate the possibility of there being more than one public record that qualifies under the statutory text has merit. The UCC Committee supports an amendment along the lines of the following text, and assuming that the "comprehensiveness" and "uniformity" criteria are satisfied.

The IACA-proposed change from "a single" to "one" in Section 9-102(a)(70) is not an improvement; it reflects a style preference only and indeed introduces a potential ambiguity not present in the current text. That proposed change should be rejected.

The IACA-proposed definition of "public organic record" might be revised to read as follows:

> "Public organic record" means the records (i) comprised of the record initially filed with a state or the United States to form or organize a registered organization and all records subsequently filed in the same office that effect an amendment or restatement of that initial record, and (ii) are available to the public for inspection or copying. For purposes of references in Part 5 of Article 9 to the name of a registered organization, in the event that any public organic record (whether an initial record or an amendment or restatement) mentions the name of the organization more than once, reference shall be to the name of the organization that the public organic record states to be the name of the organization. For purposes of references in Part 5 of Article 9 to the name of a registered organization, reference shall be to the most recently filed public organic record that is intended to state, amend or restate the name of the organization."

Establishing and identifying beyond all doubt a single source for the correct name for a registered organization furthers the goal of the current text to provide certainty and predictability.

The text suggested here is presented not as a merely stylistic alternative; it is presented to make the point that the solution should be comprehensive and address all known aspects of the problem.

The suggested second sentence of the proposed definition of "public organic record" addresses the question what is the correct name for purposes of Part 5 of Article 9 when a single record contains inconsistencies. For example, in many common formats, the name of an entity is found in the title of articles, in the signature line, and, typically, in the first paragraph (e.g. "The name of the corporation is: _____."). The name in the title and signature lines is intended merely for identification purposes, and the name in the first paragraph is intended formally to indicate the actual name of the organization.

The suggested third sentence of the proposed definition addresses the question what is the organization's name for purposes of Part 5 of Article 9 when there are more than one filed organizational documents in the public record. In such cases, the proposed text designates as the name of the organization the name provided in the most recently filed document that either states it to be the name of the organization or amends or restates the name of the organization. This is intended to focus on the most recently filed document that deals directly with the name—not necessarily the most recently filed document.

III. Correction Statements (IACA Proposal #2)

CURRENT LAW

UCC Section 9-518(a) provides:

> **9-518 (Claim regarding Inaccurate or wrongfully filed record):**
>
> "(a) A person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed."

IACA PROPOSAL

IACA's proposal would amend UCC Section 9-518(a) to read as follows:

> **9-518(a)** A person may file in the filing office a correction statement with respect to a record indexed there if:
>
> (1) ~~under the person's name if~~ the person believes that the record is inaccurate or was wrongfully filed, and
>
> (2) one or more of the following applies:
>
> (i) the record is indexed under the person's name;
>
> (ii) the person would have been entitled to file the record pursuant to Section 9-509; and
>
> (iii) the person filed the record.

DISCUSSION

Section 9-518 was designed for a single purpose only--to provide to a debtor a means to address a "bogus" filing made against it by filing a correction statement that becomes part of the public record (this is, of course, neither the exclusive solution to address the problem of "bogus" filings nor the debtor's sole remedy, there being available in most states both civil remedies and criminal penalties). The Official Comment to Section 9-518 makes this clear and notes that filing of a correction statement by a debtor largely parallels the remedy in the Fair Credit Reporting Act that allows a person to state its position regarding a disputed amount on the public record.

The IACA proposal in no way furthers this debtor-protection purpose.

One change that would be effected by the IACA-proposed amendment to Section 9-518 is to provide to a secured party the means to file a response to a correction statement filed by the debtor. There is, however, no need for a secured party to file any response, as a correction statement does not affect the effectiveness of the initial financing statement or any other filed record. If the debtor's correction statement identified a problem with the filed financing statement, a secured party's responsive filing, which under the IACA proposal would also have no legal effect, is not the proper vehicle for the secured party to remedy the problem—only a filing having a legal effect, such as an amendment or a new initial

financing statement, can accomplish this. Moreover, no negative implication could reasonably be drawn by any third party from the absence of a secured party's responsive filing; not only did the debtor's correction statement have no legal effect, but the secured party might not even become aware of the debtor's having filed a correction statement. This proposed change can serve only to mislead secured parties into wrongly thinking that they have corrected a problem with such a responsive correction statement.

A second, and still more controversial, change proposed by IACA allows a secured party to file a correction statement with respect to any financing statement that it had filed. This, of course, has nothing to do with "bogus" filings or debtor-protection. If there is an error in the financing statement, a secured party should make a filing that has legal effect, either a new initial financing statement or an amendment, not a correction statement that has no legal effect. This change risks converting the public record into an informational bulletin board (the effects of which would be uncertain and might introduce a notion of "record notice" not presently provided for in Article 9). This change would move the correction statement further away from its debtor-protection purpose.

Moreover, the language of the IACA proposal raises other issues as well. It expands the right to file a correction statement beyond a person under whose name the record is indexed (which must include the debtor (Section 9-519(c)(1)), but conceivably might embrace others), to also expressly include the person who filed the record and an otherwise undefined class--the "person who would have been entitled to file the record pursuant to Section 9-509."

UCC COMMITTEE RECOMMENDATION

The UCC Committee strongly opposes this proposal. Although publicizing errors made by filers has been mentioned as a potential benefit of the proposal, it is far from clear that any such benefit outweighs the distortion of a debtor-protection remedy and the introduction of uncertainty and risk of confusion.

IV. Safe Harbor Forms (IACA Proposal #4)

CURRENT LAW

UCC Section 9-521 provides:

> **9-521(Uniform form for written financing statement and amendment):**
>
> **(a)** A filing office that accepts written records may not refuse to accept a written initial financing statement in the following form except for a reason set forth in Section 9-516(b).
>
> **(b)** A filing office that accepts written records may not refuse to accept a written record in the following form except for a reason set forth in Section 9-516(b).

IACA PROPOSAL

IACA's proposal would amend UCC Section 9-521 to read as follows:

9-521

(a) A filing office that accepts written records may not refuse to accept a written ~~initial financing statement~~record in ~~the following~~a form ~~l~~approved by office [, nor may it refuse to accept a written record in the most recent form approved for nationwide use by the International Association of Commercial Administrators], except for a reason set forth in Section 9-516(b).

(b) A filing office that accepts written records may not refuse to accept a written record in the ~~following~~a form
approved by office [, nor may it refuse to accept a written record in the most recent form approved for nationwide use by the International Association of Commercial Administrators], except for a reason set forth in Section 9-516(b).

DISCUSSION

From the time of the initial enactment of Article 9, filing officers throughout the country generated unique paper forms to be used in their particular states (sometimes adopting forms also in use elsewhere). This process continued for decades. It obliged secured parties that had to file in more than one jurisdiction (because their collateral or their debtors were located in more than one state) to maintain supplies of numerous forms and to train their staffs to complete them properly. The multiplicity of state-required forms created inefficiencies in the financial services markets by delaying transactions, increasing the likelihood of errors and creating uncertainty regarding the effectiveness and timeliness of security interest perfection. As a result of these inefficiencies and uncertainties, a service industry developed to track the forms approved for use in the various states; while providing a useful service, these subscription services and filing services added to transaction costs and delays.

Against that background, the legislative policy, implemented in Section 9-521 of the current text, determined that there should be a single stable (because it was included in the statute) form that was accepted in all jurisdictions. The current text does not make the form mandatory from the standpoint of the filer—the filer is free to use any form that satisfies the statutory requirements. The current text also does not in any way inhibit any filing officer, or indeed, IACA, from developing or recommending use of one or more different forms—it simply prohibits every filing office that accepts paper filings from rejecting the Section 9-521 form on the basis of use of that form.

Thus, the sole purpose served by, and sole effect of, Section 9-521 is to provide a single "safe harbor" form that will be accepted in all jurisdictions, without risk of rejection on the ground of form. This is especially useful since, under the current text, a debtor that is a registered organization is located in its state of organization, and, thus, filers may well be filing in the filing office of a distant state in which they do not customarily file. By completing and submitting one of the forms in Section 9-521, a secured party can be certain that the filing office will accept the submission (provided that the requirements of Section 9-516(b) are satisfied and that the filing office accepts paper filings).

The IACA proposal would completely abandon the legislative goal by making the non-rejectable form for each state be the form designated by that state's filing office. This would eliminate a single national safe harbor form. IACA alternatively proposes that there be a single safe harbor form, but instead of the form found in Section 9-521 it would be a form from time to time promulgated by IACA. This proposal has several undesirable features. Unanimous approval by all filing offices is not a precondition to IACA adoption. Thus, IACA adoption does not mean that all states would in fact adopt that form. Moreover, the same inability to obtain unanimous agreement on a form makes it highly unlikely that all states

would unanimously adopt the proposed alternative rule. Therefore, uniformity is unlikely to be achieved. IACA deserves praise for diligently pursuing uniformity by developing Model Rules and seeking to promote their adoption, and by regular communication and efforts to develop uniform procedures. These efforts have greatly improved the situation for filers during the past few years, but have not come close to establishing uniformity (not all states have adopted the Model Rules, not all have adopted them uniformly and not all have implemented them uniformly). Further, whatever flexibility might be gained by allocating form designation to IACA rather than enshrining the single safe harbor form in the statutory text is more than outweighed by the loss of stability. Filers should not be burdened with keeping track of whether and when IACA has decided to recommend a modified form. In addition, such legislative delegation to IACA might well be subject to legal challenge. While IACA must be commended for struggling with the improvement and standardization of the UCC forms, and the Committee endorses the stated goal of achieving uniformity, the proposed IACA amendment will unlikely achieve that goal and would in the meanwhile deprive filers of the current safe harbor. Even in the context of a package of amendments to Article 9, the concept of a national safe harbor should be maintained; if improvements to the forms have indeed been developed and are acceptable to all constituencies, those improved forms should be substituted for those presently in current Section 9-521. This does not require abandonment of the safe harbor concept or delegation to IACA of the power unilaterally to make further changes.

It should be kept in mind that the current Section 9-521 safe harbor forms were developed over an extended period of time before and during the Revision process, are based largely on the national transition forms developed in consultation with filing officers and reflect the comments and suggestions of filing officers, service companies and secured parties and their legal representatives. The forms were designed to reduce error by both filers and filing offices. The forms have not proved unusable and suggestions for changes have so far not attained universal agreement.

The argument in favor of the proposed amendment seems to be based on the erroneous belief that current Section 9-521 prevents a filing office from promoting a preferred form. This is an incorrect reading of the current text. Under the current text of Section 9-521, individual filing officers and IACA are free to propose, and the various filing offices are free to adopt, IACA-approved forms—and urge filers to use those forms.

No change is needed to Section 9-521 to permit the development and use of IACA-approved forms.

Although individual filing officers have from time to time proposed modifications to the form, the only item that has actually raised an issue of broad concern is the presence of a field for Social Security numbers. The form was adopted knowing that (1) most of the states did not require that data, indeed, that most states would discourage filers from providing that data, and (2) the form's instructions, on both the face and the reverse side, do discourage providing that data. However, at the time, it was not knowable whether all states would adopt that position and, in fact, on the enactment of Revised Article 9, the two Dakotas continued their prior policy of *requiring* the filer to provide that data. However, the current text does not in any way inhibit redaction of the data when it is provided, does not in any way inhibit filing officers from better educating filers not to provide that data, and does not in any way prevent filing officers from promoting the use of a form that is identical to the statutory safe harbor form but deletes that particular field. Thus, no modification to Section 9-521 is necessary in order to deal with the Social Security number issue.

Adoption of the IACA proposal to amend Section 9-521 would eliminate the safe harbor—the sole purpose of that provision—and would not enhance uniformity of either the statutory text or the paper form actually in use. To date local variations to Section 9-521 have been limited to a handful of states. Further tinkering with Section 9-521 should be discouraged.

IACA's proposal raises the additional question whether delegating to IACA the role of the sole determining body of the UCC safe harbor form, is a "permissible legislative delegation," or whether such action would be an unconstitutional delegation of legislative authority under a state's constitution. This threshold question would need to be overcome in all 50 states to make IACA's goal of uniformity even a possibility.

Finally, it should be kept in mind that Section 9-521 deals only with paper forms. Thus, the magnitude of any perceived "problem" is a diminishing one as use of electronic filing becomes ever more widespread. Thus, perceived benefits of the proposal are outweighed by the problems engendered.

UCC COMMITTEE RECOMMENDATION

The UCC Committee strongly opposes this proposal. Experience has shown the need for and value of a single stable national statutory safe harbor form. This is compatible with, and no statutory amendment is needed to retain, the presently existing absolute freedom of each filing officer and IACA to develop and promote use of a different form.

GENERAL NOTE: Please note that if and when legislation with respect to any of the matters discussed in this Memo is introduced in California, the Committee is obliged to complete certain formal procedures required by the State Bar of California before the Committee can communicate its views on such legislation. If we then elect to do so, the Committee will evaluate such proposed legislation at that time and provide such comments on it as we deem appropriate after those procedures have been completed.

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December 11, 2007

RE; PROPOSED ARTICLE 9 STATUTORY CHANGES TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

To the Permanent Editorial Board for the Uniform Commercial Code,

On behalf of the International Association of Commercial Administrators (IACA), I would like to thank you for your prompt attention to the IACA proposed Article 9 statutory changes. We have reviewed your responses to the task force recommendations, as provided from the PEB meeting on September 27, 2007. Attached, please find the final version of IACA's proposed Article 9 statutory changes to the National Conference of Commissioners on Uniform State Laws (NCCUSL).

William Henning has informed IACA that the Permanent Editorial Board (PEB) is planning to undertake a broad study of the inconsistencies that have emerged since the original adoption of Revised Article 9. IACA was also advised that the PEB would prefer to make the IACA requests part of a broader package of revisions that results from the study. I would strongly recommend that IACA's four (4) proposed changes be considered immediately. These four (4) inconsistencies are detrimental to the accuracy of the public record maintained by a filing office and time is of the essence. Any additional delay will only lead to greater inaccuracy. Since the PEB has been quite responsive to our draft proposals in the past months, I trust we may expedite a resolution.

Finally, many of the IACA member jurisdictions have already passed their legislative sessions for this year. In order to allow for greater uniformity, the IACA Secured Transaction Section plans to present these proposed changes to its membership at the next annual meeting, in May 2008, in Salt Lake City, Utah. This will afford our membership sufficient time to present the changes to their respective legislative bodies, thereby allowing the IACA membership to implement the changes at relatively the same time.

Let us know if we may be of additional assistance and please notify us as this progresses.

Thank you,

Kelly L. Kopyt, Esq.
Secured Transaction Section Chair
International Association of Commercial Administrators

International Association of Commercial Administrators (IACA) Proposed Article 9 Statutory Changes to the National Conference of Commissioners on Uniform State Laws (NCCUSL)

December 11, 2007

1. **"Public Record" Definition:** This proposed revision intends to clarify the application of existing law. A public organic record is a record that is filed to form, organize, incorporate, or otherwise create an organization. If the organization is organized solely under the law of one state or the United States, it is a "registered organization" under this act. The term includes any amendments to or restatements of the original record that are filed publicly. The term includes the articles of incorporation of a business corporation, the articles of incorporation of a nonprofit corporation, a certificate of limited partnership, and a certificate of organization of a limited liability company. In those states where a record must be filed for another type of entity, such as a business trust or a cooperative, to come into existence, the record will constitute a public organic record and the entity will be a registered organization. The record must also be available to the public for inspection or copying.

   Amend Section 9-102(a)(70): "Registered organization" means an organization (i) organized solely under the law of one State or the United States, and (ii) created by the filing of a public organic record with a governmental unit of the State or the United States.

   Add 9-102(a)(67)(A): "Public organic record" means a record that is (i) filed with a State or the United States to create an organization, (ii) shows that the organization has been created, and (iii) is available to the public for inspection or copying. The term includes an amendment to or restatement of the record that is filed with the State or the United States and available to the public for inspection or copying.

   Amend 9-503(a)(1): if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on its public organic record;

2. **Claim Concerning Inaccurate or Wrongfully Filed Record (Correction Statements):** This proposed amendment intends to provide the filer, debtor and secured party with the ability to file a correction statement with respect an indexed record. IACA would like to keep the section title as "Claim Concerning Inaccurate or Wrongfully Filed Record" so as to avoid an unnecessary revision of the associated form.

   Amend 9-518(a): (a) A person may file in the filing office a correction statement with respect to a record indexed there if:

   (1) the person believes that the record is inaccurate or was wrongfully filed, and
   (2) one or more of the following applies:
      (i) the record is indexed under the person's name;

(ii) the person would have been entitled to file the record pursuant to Section 9-509; or
(iii) the person filed the record.

3. **Transmitting Utility Financing Statements:** If a debtor is a transmitting utility that did not indicate as such on the initial financing statement, the standard lapse period would be applied by the filing office. Section 9-515(f) provides that the transmitting utility debtor may indicate its status on a "financing statement," however, due to system limitations, filing offices are unable to change the lapse period when a financing statement amendment is filed. The correct lapse period must be indicated on the initial financing statement only.

Amend 9-515(f): Transmitting Utility Initial Financing Statement. If a debtor is a transmitting utility and a filed initial financing statement so indicates, the initial financing statement is effective until a termination statement is filed.

4. **Uniform Form of Written Financing Statement and Amendment:** Approved UCC forms have become increasingly inconsistent from one jurisdiction to the next. Many jurisdictions now require the use of a form quite different form that presented in Article 9. In order to encourage use of a standard form, IACA requests that the model forms be removed from 9-521 and reference be made to the IACA Recommended UCC Forms. IACA is diligent in revising its IACA Recommended UCC Forms and we are confident that we can encourage uniformity in the jurisdictions where such legislative delegation is lawful. Additionally, removal of the model form will encourage routine review and revision, when necessary.

Amend 9-521: Uniform Form of Written Financing Statement and Amendment.

(a) **Initial Financing Statement Form.** A filing office that accepts written records may not refuse to accept a written record in a form approved by the office [,nor may it refuse to accept a written record in the most recent form approved for nationwide use by the International Association of Commercial Administrators], except for a reason set forth in Section 9-516(b).

(b) **Amendment Form.** A filing office that accepts written records may not refuse to accept a written record in a form approved by the office [,nor may it refuse to accept a written record in the most recent form approved for nationwide use by the International Association of Commercial Administrators], except for a reason set forth in Section 9-516(b).